

UNITED STATES

v.

ROBERT C. LeFAIVRE

IBLA 93-387

Decided

Appeal from a decision by Administrative Law Judge Ramon M. Child declaring eight dependent millsites null and void. WYW 123560.

Affirmed.

1. Mill sites: Generally--Mill sites: Dependent--Mill sites: Determination of Validity--Mining Claims: Mill sites

In order to determine whether a dependent mill site, which has not been actually used for mining and milling purposes for a significant period of time, has been "occupied" with the meaning of 43 U.S.C. § 42(b) (1994), a number of factors must be considered, including the validity of any associated unpatented mining claim, the extent of the reserves on any patented claim, the length of time the claim has not been used and the claimant's explanation for the failure to use the claim for mining or milling purposes during this period.

2. Mill sites: Generally--Mill sites: Dependent--Mill sites: Determination of Validity--Mining Claims: Mill sites

Under the express provisions of 30 U.S.C. § 42(b) (1994), a mill site claimant is entitled only to such land as is actually needed for mining and milling purposes.

APPEARANCES: Robert C. LeFaivre, Rock Springs, Wyoming, pro se; Glenn F. Tiedt, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Robert C. LeFaivre has appealed from a decision of Administrative Law Judge Ramon M. Child, dated April 1, 1993, declaring the Invisible

Nos. 1 through 8 millsite claims (WMC 204033 through WMC 204040) located in SW¼ NW¼ sec. 10, T. 19 N., R. 103 W., sixth principal meridian, null and void because they were not being used or occupied for mining, milling, processing, beneficiation, or other purposes in association with LeFaivre's placer mining claims. For reasons set forth below, we affirm.

The millsite claims in question were located on September 5, 1980, purportedly for use in association with various pumice claims held by LeFaivre. Subsequent thereto, on October 12, 1984, concerned that the millsite claims might have been located as a subterfuge for establishing unauthorized use and occupancy of public lands, the Wyoming State Office, Bureau of Land Management (BLM), authorized a validity examination of the claims. An examination was conducted in 1985, and a report prepared at that time recommended issuance of a contest complaint challenging the millsite claims. No action, however, was taken pursuant to this recommendation until 1991 when, following a March 14, 1991, reexamination of the claims which concluded that nothing had changed since the 1985 examination, a contest complaint was issued.

The complaint alleged that the lands embraced by the millsites were not being used for mining, milling, processing, beneficiation, or other operations in connection with placer mining claims. LeFaivre timely answered the complaint, denying the charges and affirmatively asserting that the land within the millsite claims was being used and occupied for purposes of mining, milling, processing, beneficiation, and other operations incidental with development of associated placer mining claims. Thereafter, the matter came on for hearing before Judge Child on November 7, 1991.

At the hearing, the sole Government witness was Randall Porter, the Resource Area Geologist for the Green River Resource Area. Porter testified that, pursuant to the approval obtained from the Wyoming State Office, he conducted a validity examination of the subject millsites on March 4, 1985. His report, which was admitted into evidence as exhibit G-2, identified numerous pieces of equipment, including automobiles, which were strewn across some of the claims. See Exh. 2 at 3-5. The report continued:

None of the equipment listed with the above claims has been moved or assembled and put into working order since being moved to the millsite claims. From their appearance, much of the equipment had not been in functioning condition for several years before being brought to the millsite claims. Some of the equipment appears to have come from claimant's previous sand and gravel operations in Green River, Wyoming, and was last operated in 1970 or 1971.

(Exh. G-2 at 5). Porter testified that, based on his examination, he had concluded that the millsite claims were not being used in connection with any milling or beneficiation activity (Tr. 12).

Porter also related that he had revisited the claims in 1991 and had, at that time, prepared a video which was shown at the hearing (Exh. G-15).

Porter narrated the showing of the video (see Tr. 17-39), which generally depicted the same situation described in his 1985 report, though there were additional items of equipment found on the claims in 1991 which had not been there in 1985, including a trailer in which LeFaivre was residing.

See Tr. 19, 22. Porter reiterated the conclusion which had been reached in his original report that the millsite claims were "not being used for any milling activity" (Tr. 56). Porter also testified that while he had, over the intervening 7 years, observed different equipment being brought onto the millsites, he had never observed any of the equipment being used for milling purposes (Tr. 58).

Two individuals testified on behalf of the contestee. The first of these was Robert L. Gordon, the individual with jurisdiction over the zoning office of Sweetwater County. While contestee clearly hoped to develop information concerning zoning actions undertaken by Sweetwater County which, in contestee's view, had had an adverse impact on the development of the millsites (Tr. 65), Gordon testified that, in fact, he knew very little concerning the millsites and his information came primarily from the contestee (Tr. 62-63). Gordon was generally unable to provide any relevant information concerning the issues involved in this appeal. 1/

LeFaivre also testified on his own behalf. LeFaivre recounted that historically the mining claims associated with (what he referred to as) the LeFaivre Millsite were the Pumice Nos. 1 to 8 placer mining claims (Tr. 71). However, he presently considered the Flow Lava No. 1 placer mining claim to be the key claim with respect to the LeFaivre Millsite (Tr. 73). Noting that his right to the Flow Lava claim was under challenge, 2/ he asserted that he had been unwilling to invest any more funds in the development of the millsite until the challenge was resolved (Tr. 74, 78).

On cross-examination, LeFaivre admitted that, though he had held title to the pumice claims since the mid-1960's, there had been no commercial production from those claims (Tr. 81) nor had the LeFaivre Millsite ever been used in a commercial sense (Tr. 81-82). LeFaivre also admitted that

1/ It became obvious during the course of contestee's examination of Gordon that the individual he had desired to call was Mark Kot with whom he had apparently had some dealings. LeFaivre failed to subpoena him, however, and Kot was not available at the hearing (Tr. 68-69).

2/ The Flow Lava No. 1 placer mining claim was the subject of a separate contest proceeding (WYW 114256) for which a hearing had been conducted the previous day. This contest resulted in a declaration by Judge Child that the Flow Lava No. 1 claim was null and void, which decision was appealed to the Board and docketed as IBLA 93-353. By decision styled United States v. LeFaivre, 138 IBLA 60 (1997), the Board affirmed Judge Child's declaration of invalidity.

the trailer on the millsite was his sole residence at the present time (Tr. 82), but justified use of it on the need to provide security for the equipment found on the site.

Following the completion of testimony and the receipt from both the contestant and contestee of proposed findings of fact and conclusions of law, Judge Child issued his decision. In this decision, he first recounted the evidence which had been developed at the hearing and then held that the evidence established that the millsite claims had never been used for mining or millsite purposes. While recognizing that contestee was then living on the millsites and that the contestee had moved numerous pieces of equipment onto the millsites, Judge Child expressly held that this was not indicative of good faith. As Judge Child explained:

Contestee's equipment on the millsites is not currently in operating condition nor was it in operating condition in 1985 when a Validity Examination was conducted by a geologist employed by contestant. While some of the equipment, such as the conveyor belt, the hopper, and perhaps the electrical equipment, could conceivably be used in connection with a mining or milling operation, this equipment remains inoperable and has not been moved in seven years.

The only improvements contestee has made on the property are the addition of a trailer which he uses as a residence and as an office and the installation of a pipe and "dirt work" going up to the gateway. He also has about \$200-300 worth of iron on the millsites which he intends to use in building a manufacturing plant. Contestee has not made any improvements which would indicate that he intends to process or beneficiate minerals from his associated mining claims. [Citations to transcript omitted.]

(Decision at 4).

Judge Child concluded that, since none of the millsites were used or occupied for purposes of mining, milling, processing, beneficiation, or other purposes in association with any of contestee's placer mining claims, all of the millsites were null and void (Decision at 6-7). From this determination, LeFaivre has pursued the instant appeal.

[1] The millsites involved in the instant appeal were located pursuant to section 15 of the Mining Law of 1872, as amended by the Act of May 18, 1960, 74 Stat. 7, 30 U.S.C. § 42(b) (1994). That Act provides, in relevant part:

Where nonmineral land is needed by the proprietor of a placer claim for mining, milling, processing, beneficiation, or other operations in connection with such claim, and is used or occupied by the proprietor for such purposes, such land may be included in an application for patent for such claim, and may

be patented therewith subject to the same requirements as to survey and notice as are applicable to placers. No location made of such nonmineral land shall exceed five acres * * *.

30 U.S.C. § 42(b) (1994).

As is obvious, there are a number of separate elements to the grant. Thus, the location must be of no more than 5 acres of nonmineral land which land must be both needed by the proprietor of a placer claim for mining, milling, processing, beneficiation, and the like, ^{3/} and must be used or occupied for such purposes as a precondition for obtaining the grant. Since these are separate elements, inability to show that the land is needed for the enumerated purposes or that it is actually being used or occupied for those purposes defeats any location made under the grant's provisions.

In the instant case, while the record developed at the hearing was not voluminous, it was more than adequate to highlight numerous deficiencies in the instant locations. ^{4/} It is uncontradicted that, since at least the

^{3/} That the statute intended to require the locator to evidence a need for the land, independent of any use or occupancy, is made clear in the legislative history of the Act. Thus, the 1960 Act was originally proposed to remedy a lacuna in the law which, prior to 1960, permitted the location of millsites associated with lode claims but had no similar provision allowing millsite locations in association with placer claims. In recommending adoption of the proposed amendment, the Assistant Secretary of the Interior, proposed modifications of the pending language to prevent possible abuse of the statute:

"[W]hile, as we have pointed out above, there is often today a need for the use of nonmineral land for mining, milling, and other purposes in conjunction with a placer claim, this is not always true, and placer claims sometimes afford adequate space within their own limits for the carrying out of such functions. We think that the aim of S. 2033 would still be achieved and the Government's interests would also be protected if the words 'used or occupied' at page 1, line 7, were replaced by the word 'needed.' At page 1, line 10, immediately after the comma should be inserted 'and is used or occupied by the proprietor for such purposes.'" H. Rep. No. 1265, 86th Cong. 2d Sess, reprinted in 1960 U.S. Code Cong. & Admin. News 1803, 1805. As the House Report recommending adoption of the legislation noted, all of these changes were incorporated in the bill which was ultimately adopted. Id. at 1803.

^{4/} We note that contestee consistently refers to these millsite locations as a single millsite claim. This is not correct. The applicable law clearly limits the extent of any dependent millsite claim associated with a placer mining claim to 5 acres. See 30 U.S.C. § 42(b) (1994). Since contestee has seen fit to locate eight separate millsite claims, each embracing 5 acres, contestee is required to establish the validity of each one on an individual basis and may not simply assert that they should be treated as a single millsite claim.

mid-1960's, neither the pumice claims nor the Flow Lava No. 1 claim have been commercially mined. Thus, the millsite claims are clearly not being used for mining purposes. See, e.g., United States v. Skidmore, 10 IBLA 322, 327 (1973); United States v. Wedertz, 71 I.D. 368, 372-73 (1964). And, since it is equally clear that there has been nothing to mill from these claims, the millsites are also obviously not being used for milling purposes or for any other purposes in conjunction with the associated placer claims. See United States v. Parsons, 33 IBLA 326, 335 (1978).

There remains, of course, the question whether these millsite claims are being "occupied" for mining or milling purposes. As this Board pointed out in United States v. Swanson, 93 IBLA 1, 21, 93 I.D. 288, 300 (1986), "[w]hile 'use' under 30 U.S.C. § 42 (1982) necessarily implies present mining or milling activities, it has long been noted that land may be 'occupied' under the statute even in the absence of present 'use' of the land for mining or milling purposes." In Swanson, the Board examined, in some detail, the factors properly utilized to determine the validity of a millsite where there is no present qualifying use but there are assertions that the claim is being "occupied" for mining or milling purposes:

As far back as Charles Lennig, *supra*, the Department held that, in the absence of actual use of the land for mining or milling purposes, the claimant must show "an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes." However, other Departmental decisions have also noted that "the mere intention to use land for mining and milling purposes some time in the future is not sufficient to validate a location." United States v. Herron, A-27414 (Mar. 18, 1957). As the Board suggested in United States v. Cuneo, 15 IBLA 304, 81 I.D. 262 (1974), "The concept of time also comes into play in considering the nonuse of the millsites." *Id.* at 324, 81 I.D. at 271. The Board continued:

In considering the issue of occupancy of a millsite which is not being used, we must apply a test of reasonableness to determine whether the period of nonuse demonstrates invalidity. Within this concept of reasonableness, factors in addition to time of nonuse are relevant, namely: the condition of the mill; the potential sources of ore to be run through the mill; the marketing conditions; the costs of operations, including labor and transportation; and all factors bearing upon the economic feasibility of a milling operation being conducted on the site.
[Footnote omitted.]

Id. at 326-27, 81 I.D. at 272-73.

Admittedly, since Cuneo involved an independent millsite the elements listed were directed primarily to that type of

situation, and different elements would, we believe, properly be considered relevant for a dependent millsite: the validity of the claim, if unpatented (United States v. Larsen, 9 IBLA 247 (1973)); the extent of mineral reserves on a patented claim (cf. United States v. Skidmore, 10 IBLA 322 (1973)); the length of nonuse and the amount of time that might reasonably be expected to be consumed in putting the millsites to use. Included herein would be the reasonable extent of use consistent with the scope of foreseeable activities. United States v. Swanson, [14 IBLA 158, 81 I.D. 14 (1974)]. A claimant's stated intent or his mere willingness to expend time and effort in developing one or more millsites cannot substitute for objective evidence that the purposes of the millsite law have been accomplished.

Id. at 22-23, 93 I.D. at 300.

As we noted in Swanson, the determination of when occupancy, independent of actual use, is sufficient to show entitlement under the law requires a weighing of all of the circumstances surrounding the occupancy.

Herein, while there is no question that the millsites are, to a certain extent, being occupied in a generic sense, it is clear from the record that there is simply no present occupancy of the claim for mining or milling purposes. Contestee has, indeed, expressed the hope that, sometime in the future, problems surrounding his mining ventures will be resolved and he will proceed to utilize the millsites for purposes associated with the placer claims. But the objective reality of the matter is that, despite the fact that contestee has held title to eight of the placer mining claims for over 25 years, there has been no production from those claims in that time, nor have any of the millsites been used for mining or milling purposes since their location in 1980. The sole use of any of the millsite claims has been to serve as a sort of collection site for numerous items of equipment in varying stages of disrepair. This is not the type of use for which Congress has deemed it appropriate to permit the appropriation of public land. We must agree with Judge Child that the millsites claims are not being used or occupied in good faith for mining or milling purposes in association with placer mining locations.

[2] Moreover, while the record is silent as to whether or not adequate areas exist within contestee's placer mining claims to allow him to mine, mill and beneficiate any ore produced therefrom, should such an eventuality ever come to pass, the record clearly establishes that, even assuming that contestee had established qualifying use of some of the land embraced by his claims under the millsite law, his multiple locations are totally unjustified.

Contestee appears to be operating under a misconception that, simply because he had eight placer mining claims, he was entitled to claim eight millsites. Such has never been the law. As long ago as the decision in Alaska Copper Co., 32 L.D. 128 (1903), the Department, in the context of

millsites associated with lode locations, 5/ expressly held that "[w]hilst no fixed rule can well be established, it seems plain that ordinarily one mill site affords abundant facility for the promotion of mining operations upon a single body of lode claims." Id. at 130. Similarly, in United States v. Swanson, supra, the Board examined in considerable detail multiple millsite locations to determine not only which ones were being utilized but to determine which ones were actually needed. The Board ultimately not only rejected portions of millsites for nonuse but actually rejected claims to some millsites which contained improvements on the ground that more than adequate areas to hold these improvements existed on other millsites which were being allowed. Id. at 38-39, 93 I.D. at 309.

In the confines of the instant case, even assuming that the mining and milling operations were ongoing rather than purely speculative at the present time, there would seem to be no justification for allowing anything more than a single 5-acre millsite claim. Since, however, as explained above, the record clearly establishes that none of the millsites are presently used or occupied for mining or milling purposes, within the meaning of 30 U.S.C. § 42(b) (1994), all of the claims were properly declared null and void.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge

5/ We note that, while Congress expressly provided that those who located dependent millsite claims in association with placer mining claims were required to establish a need for the land in addition to showing the requisite use or occupancy (see n.3, supra), the decision in Alaska Copper Co., supra, shows that this same requirement has historically been applied to dependent millsites associated with lode claims as well as independent quartz mills or reduction works. See also United States v. Swanson, 14 IBLA at 171-74, 81 I.D. at 20-22.